90-1599

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DENNIS FELIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant may be prosecuted for conspiracy to violate several narcotics statutes after previously having been prosecuted for conduct alleged in some of the overt acts of the conspiracy charge.

2. Whether prosecution of respondent for narcotics offenses in connection with the operation of a narcotics laboratory in Oklahoma is barred because he was previously prosecuted for attempting to set up a narcotics laboratory in Missouri, where evidence of his conduct with respect to the Oklahoma laboratory had been introduced in the Missouri prosecution as evidence of his intent to commit the Missouri offense.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-40a) is reported at 926 F.2d 1522. The decision of the district court (App., *infra*, 41a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. On September 15, 1987, respondent was indicted in the Western District of Missouri for attempting to manufacture methamphetamine from on or about August 26, 1987, to on or about August 31, 1987, in violation of 21 U.S.C. 846. App., *infra*, 62a-63a. He was convicted and his conviction was affirmed by the Eighth Circuit. *United States* v. *Felix*, 867 F.2d 1068 (1989).

At respondent's trial on the Missouri indictment, the government introduced evidence that on August 26, 1987, respondent had met with George Dwinnells, who was employed by a supplier of scientific equipment and, unbeknownst to respondent, was a DEA informant. Dwinnells testified that respondent sought to purchase chemicals and equipment needed to make methamphetamine. Respondent made a down payment of $7,500 toward the purchase and gave Dwinnells instructions for securing a trailer to transport the merchandise. In later telephone conversations, respondent increased his order for chemicals and equipment and instructed Dwinnells to deliver the items to a Joplin, Missouri, hotel, on August 31, 1987. Dwinnells met respondent at the hotel on the designated date. Respondent was arrested after inspecting the chemicals and equipment and hitching the trailer in which Dwinnells had transported them to his own car. 867 F.2d at 1070-1071.

At trial in the Missouri case, the government introduced evidence that respondent had been involved earlier in 1987 in manufacturing methamphetamine in Oklahoma. See 867 F.2d at 1072-1073. That evidence showed that during the Spring of 1987 respondent had furnished government witness Paul Roach with chemicals and materials for making methamphetamine in exchange for lessons on how to "cook"—*i.e.*, produce—the drug. Roach testified that he and respondent had used the chemicals and equipment to manufacture methamphetamine in a trailer near Beggs, Oklahoma. On July 13, 1987, law enforcement agents seized the unattended trailer, but they did not arrest respondent at that time. 867 F.2d at 1070-1071.

The trial court instructed the jury that the evidence of the Oklahoma transactions could not be used "to decide whether [respondent] carried out the physical acts involved in the crime charged here." See 867 F.2d at 1075. Instead, it was admitted to show respondent's state of mind with respect to the chemicals he arranged to have delivered in Missouri. Respondent's defense had been that "he never had criminal intent, but had been acting under the mistaken belief that he was working in a covert DEA operation." 867 F.2d at 1074. In that context, the Eighth Circuit found the evidence concerning the methamphetamine laboratory in Oklahoma to be "highly probative of [respondent's] knowledge and intent," and thus admissible under Fed. R. Evid. 404(b). 867 F.2d at 1073.

2. On February 16, 1989, respondent was named in eight counts of an 11-count indictment filed in the Eastern District of Oklahoma. App., *infra*, 51a-61a. Count 1 charged that he conspired in the Eastern District of Oklahoma and elsewhere between May 1, 1987, and August 31, 1987, to manufacture, possess, and distribute methamphetamine, in violation of 21

U.S.C. 846. Respondent was named in nine of the 18 overt acts that the indictment charged had been committed "[t]o effect the objects of the conspiracy." Two of the nine overt acts in which respondent was named took place within the time period of the Missouri indictment. Overt act 17 charged that "[o]n August 26, 1987, [respondent], while in Tulsa Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine." App., *infra*, 55a. Overt act 18 charged that "[o]n August 31, 1987, [respondent], while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." *Ibid.*

Respondent was also named in seven substantive counts. Counts 2 through 5 charged that, in violation of 21 U.S.C. 841(a)(1), respondent had on or about July 13, 1987, in the Eastern District of Oklahoma, manufactured methamphetamine (Count 2), possessed methamphetamine with intent to distribute it (Count 3), possessed methamphetamine oil with intent to manufacture methamphetamine (Count 4), and manufactured phenylacetone (Count 5). App., *infra*, 55a-57a. Count 6 charged that, between June 1, 1987, and July 13, 1987, in the Eastern District of Oklahoma, respondent maintained a place and enclosure for manufacturing methamphetamine, in violation of 21 U.S.C. 856. App., *infra*, 57a. Counts 9 and 10 charged that, on or about June 21, 1987 (Count 9) and July 13, 1987 (Count 10), respondent traveled from Texas to the Eastern District of Oklahoma with intent to promote the manufacture of methamphetamine and thereafter attempted to promote such activity, in violation of 18 U.S.C. 1952. App., *infra*, 59a-60a.

At trial, the government introduced much of the same evidence that had been introduced in the Missouri trial pursuant to Rule 404(b). Respondent was convicted on all counts and sentenced to serve concurrent 20-year terms of imprisonment on Counts 1 through 6 and five-year terms of imprisonment on Counts 9 and 10. The 20-year sentence imposed for the Oklahoma offenses was set to run consecutively to the sentence imposed for respondent's Missouri conviction.

3. A divided panel of the Tenth Circuit reversed respondent's convictions on Counts 1 through 6 and affirmed his convictions on Counts 9 and 10.

a. Writing for the majority, Chief Judge Holloway first addressed the relationship between this Court's recent decisions in *Dowling* v. *United States*, 110 S. Ct. 668 (1990), and *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990). In *Dowling*, this Court held that the Double Jeopardy Clause did not bar the government from introducing relevant evidence in a bank robbery prosecution even though that evidence had been the subject of a previous prosecution for burglary, assault, and related offenses in which the defendant had been acquitted. In *Grady*, this Court held that a second prosecution was barred where "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant had already been prosecuted." 110 S. Ct. at 2093. Noting that *Dowling* "concerned * * * the admissibility of evidence in conformity with the collateral estoppel principle of *Ashe* [v. *Swenson*, 397 U.S. 436 (1970)]," while "*Grady* concerned the protection afforded by the Double Jeopardy Clause from successive prosecutions for the same conduct," Chief Judge

Holloway held that "[i]t is this latter protection * * * which is implicated here and this causes us to focus mainly on the teaching of *Grady*." App., *infra*, 14a.

As to the conspiracy count in the current indictment, the court followed the Second Circuit's recent holding in *United States* v. *Calderone*, 917 F.2d 717 (1990), petition for cert. pending, No. 90-1527, that, for purposes of applying *Grady* to a conspiracy charge, it is the conduct from which the jury is asked to infer a conspiratorial agreement—rather than the agreement itself—that is considered to be the conduct for which the defendant is prosecuted. App., *infra*, 13a. The court then summarized the proof presented in the Missouri trial, as recounted by the Eighth Circuit, and concluded that "[a]s to Count 1, the conspiracy charge, the duplication was extensive." *Id.* at 15a.

Specifically, the court pointed out that in both trials the government proved respondent's course of conduct in learning to make methamphetamine and setting up the Oklahoma lab. Further, in both trials the government proved that, after the raid on the Oklahoma lab, respondent had purchased chemicals and equipment for setting up a new lab and had taken delivery of those materials in Joplin, Missouri. The court noted that respondent's conduct in arranging for the purchase of the chemicals and equipment and receiving delivery of them were listed as overt acts in the Oklahoma conspiracy count. App., *infra*, 15a-17a. The court also noted that both the Missouri indictment and the Oklahoma conspiracy count focused on the actions of respondent and Roach, and that both the Missouri and Oklahoma charges alleged conduct that took place outside their respective States. Finally,

the court found that "the relevant time frames of the two indictments also overlap" (*id.* at 18a); the court stated that "[t]he Missouri prosecution was premised on conduct that occurred from the spring of 1987 to August 31, 1987," while the Oklahoma conspiracy count charged conduct that occurred from approximately May 1, 1987 to August 1, 1987. *Ibid.* Based on those facts, the court of appeals concluded that the Oklahoma conspiracy count charged "the same conduct for which [respondent] was previously convicted in Missouri" and that prosecution on the Oklahoma conspiracy charge was therefore barred by the Double Jeopardy Clause. *Ibid.*

With respect to the substantive offenses charged in Counts 2 through 6, the court noted that in both trials the government proved that respondent had bought chemicals and equipment to manufacture methamphetamine, that he had used those chemicals to produce methamphetamine at the Beggs, Oklahoma, trailer, and that the trailer had subsequently been seized by law enforcement authorities. App., *infra*, 18a-19a. That evidence was used to show intent in the Missouri trial[1] and as direct evidence of the Oklahoma charges. Because the government relied on the same evidence to establish critical elements in each case, the court of appeals concluded that re-

[1] The court of appeals was mistaken in stating that evidence of respondent's conduct in connection with the Beggs lab was used in the Missouri prosecution to "establish[]" the "substantial step" element of the attempt offense. App., *infra*, 17a; see also *id.* at 20a. Compare 867 F.2d at 1071. As Judge Anderson noted, the Missouri jury was specifically instructed that the Rule 404(b) evidence relating to the Beggs lab could be used only "on the question of motive, opportunity, preparation, plan, knowledge, identity or absence of mistake." App., *infra*, 26a.

spondent's convictions on Counts 2 through 6 had to be reversed. *Id.* at 18a-20a.

Finally, the court affirmed respondent's convictions on Counts 9 and 10, charging travel on June 21 and July 13, 1987, respectively, from Texas to Oklahoma to promote the manufacture of methamphetamine. According to the court, the conduct alleged in those counts was not sufficiently closely related to the conduct proved in the Missouri trial to require that his convictions under those counts be reversed under the Double Jeopardy Clause. App., *infra*, 20a-21a.

b. Judge Anderson dissented from the dismissal of the first 6 counts of the Oklahoma indictment. He stated that even after *Grady*, a mere overlap of proof in two prosecutions does not establish that the second prosecution is barred by the Double Jeopardy Clause. App., *infra*, 23a & n.1. According to Judge Anderson, *Grady* requires instead a showing that (1) the conduct sought to be proved in the second prosecution "constitutes an offense for which the defendant has already been prosecuted," and (2) the conduct is "being proven to establish an essential element" of the second prosecution. App., *infra*, 24a. In Judge Anderson's view, that test, if applied correctly, would not require reversal of any of respondent's convictions.

The conduct charged in the conspiracy count, Judge Anderson argued, did not "constitute an offense for which the defendant has already been prosecuted." Judge Anderson noted that the Missouri indictment alleged conduct only "[f]rom on or about August 26, 1987, to on or about August 31, 1987." App., *infra*, 30a. Although the government had introduced evidence in the Missouri trial of respondent's conduct prior to August 26, 1987, that evidence had been introduced only pursuant to Rule 404(b). In Judge

Anderson's view, respondent was not prosecuted for that conduct in the Missouri case. App., *infra*, 30a.

Judge Anderson further argued that although the Oklahoma conspiracy count contained two overt acts that related directly to the Missouri offense, the inclusion of those overt acts did not convert the Oklahoma conspiracy into the "same offense" as the attempt for which respondent was prosecuted in Missouri. An attempt, he explained, consists of two elements—intent and a substantial step toward commission of the offense—and the proof that established the overt acts in the conspiracy indictment at most established the "substantial step" element of the attempt offense. App., *infra*, 31a. In this respect, Judge Anderson disagreed with Judge Newman's statement in *Calderone* that *Grady* bars a subsequent prosecution in which conduct constituting an element of a prior offense—as opposed to the entirety of the prior offense—must be proved. App., infra, 32a.

With respect to the substantive counts, Judge Anderson noted that each of them "was based on [respondent's] conduct on or before July 13, 1987, in establishing and operating the methamphetamine lab in Beggs, Oklahoma." App., *infra*, 25a. In contrast, the Missouri count alleged conduct that took place more than a month later, on August 26-31, 1987. Although the government had introduced evidence in the Missouri trial concerning respondent's pre-August conduct, Judge Anderson stated that introducing evidence of a prior bad act under Rule 404(b) "is not prosecution for that act." App., *infra*, 26a. In Judge Anderson's view, the court of appeals' conclusion to the contrary conflicted with this Court's analysis in the *Dowling* case. App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

This case presents important issues that merit this Court's review. The Tenth Circuit in this case reached the remarkable conclusion that a prosecution of respondent for attempting to set up one methamphetamine lab barred his subsequent prosecution for a number of offenses relating to his operation of a separate methamphetamine lab. The court was able to reach that conclusion only by making serious errors in applying the principles of double jeopardy law.

First, the court departed from the well-settled principle that the gravamen of a charge of criminal conspiracy is that the defendant entered into an agreement with others to accomplish criminal objectives. Instead of recognizing that the "conduct" at issue in a conspiracy prosecution is thus the agreement, the court held that the "conduct" at issue in such a case is the acts of the defendant from which the government intends to ask the jury to infer the conspiratorial agreement. The court's decision on that point is in direct conflict with a recent decision of the Fourth Circuit and is in tension with the reasoning of a recent Eleventh Circuit decision as well.

Second, the court held that the introduction of "similar act" evidence to establish a defendant's intent bars a separate prosecution of the defendant for committing those similar acts. That holding departs substantially from well-established principles regarding the use of "similar act" evidence.

Both holdings have the effect of upsetting settled doctrine that the government may, in a variety of settings, introduce evidence that a defendant has engaged in criminal conduct other than that which is specifically charged in the indictment without losing the opportunity to prosecute the defendant for that

conduct separately. Further review is therefore warranted on both issues.

1. The court of appeals held that respondent's conspiracy conviction in Oklahoma was a "successive prosecution[] for the same conduct for which [respondent] was previously convicted in Missouri," and was therefore barred by the Double Jeopardy Clause. App., *infra*, 18a.

The Tenth Circuit did not bar the conspiracy charge on the ground that the agreement that formed the basis for the Oklahoma conspiracy charge was the same as an agreement alleged and proved in the Missouri case. Because the Missouri prosecution involved a charge of attempt, not conspiracy, no agreement was alleged or proved in the Missouri prosecution. Rather, the court's decision that the conspiracy count was jeopardy-barred rested on its holding that the offense being prosecuted under the conspiracy count consisted of conduct from which the government sought to have the jury infer the defendant's participation in the conspiracy. Since that conduct consisted in part of conduct that had previously been proved in the course of the Missouri case, the court of appeals concluded that the Oklahoma and Missouri offenses were "the same offense" for double jeopardy purposes.

The court of appeals' analysis is at odds with the law of conspiracy. "The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *United States* v. *Braverman*, 317 U.S. 49, 53 (1942). Accord *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (agreement "is all but synonymous" with conspiracy); *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). Because a criminal conspiracy poses special dangers to society," independently of any

other evil it seeks to accomplish," *Dennis* v. *United States*, 341 U.S. 494, 573 (1951) (Jackson, J., concurring), an individual who joins a conspiracy is liable for his participation in the criminal agreement in addition to any liability he may have for committing the substantive crimes that are the objects of the conspiracy. In other words, a conspiracy is not "the same offense" as its object offenses. See *Garrett* v. *United States*, 471 U.S. 773, 778 (1985); *Iannelli* v. *United States*, 420 U.S. 770, 781-782 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946). Accordingly, the government may prosecute a defendant separately for a substantive offense and for conspiracy to commit that offense. See, *e.g.*, *United States* v. *Bayer*, 331 U.S. 532, 542-543 (1947); *United States* v. *Guthrie*, 789 F.2d 356, 358 (5th Cir. 1986); *United States* v. *Hines*, 713 F.2d 584, 586 (10th Cir. 1983); *United States* v. *Snell*, 627 F.2d 186, 188 (9th Cir. 1980), cert. denied, 450 U.S. 957 (1981); *United States* v. *Brown*, 604 F.2d 557, 559 (8th Cir. 1979); *United States* v. *Bosch*, 584 F.2d 1113, 1118-1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 919 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Ricco*, 549 F.2d 264, 273 (2d Cir.), cert. denied, 431 U.S. 905 (1977).

Contrary to settled precedent, the court of appeals' decision in this case would require the government to prosecute a conspiracy and all substantive offenses that come within it in the same prosecution. If any substantive offense committed in furtherance of the conspiracy were prosecuted separately—even a substantive offense that included no element of agreement and required the government to prove only the conduct of a single individual—the government would lose the opportunity to prosecute the conspiracy later, or at least to introduce evidence concerning the previously prosecuted substantive offense. Presumably, the same result would follow if the order of prosecutions were reversed; prosecution for the conspiracy would immunize the defendant from later prosecution for any substantive offense evidence of which was introduced to help prove the conspiratorial agreement.

The court of appeals' ruling on that issue squarely conflicts with the decision of the Fourth Circuit in *United States* v. *Clark*, No. 90-5771 (Mar. 20, 1991). In *Clark*, the defendant was found in constructive possession of a suitcase containing cocaine and heroin. He was first tried and convicted for the substantive offenses of possessing cocaine and heroin with intent to distribute them. Seven months after his conviction on those counts, he was indicted for conspiring to possess and distribute cocaine and heroin, in violation of 21 U.S.C. 846. The Fourth Circuit noted that "[the defendant's] possession of drugs at the airport, the same conduct for which he had been convicted earlier, was alleged as overt act number 18 in the conspiracy indictment and evidence about the airport incident was introduced at [the conspiracy] trial." Slip op. at 3. Nonetheless, the Fourth Circuit upheld the defendant's conviction over his objection that the conspiracy charge was barred under *Grady* v. *Corbin*, because the offenses for which he was convicted in his first trial were alleged and proved as an overt act in his subsequent conspiracy prosecution. The analysis and result in *Clark* cannot be squared with the analysis and result in this case.

Other circuits as well have had difficulty in discerning the effect of this Court's decision in *Grady* v. *Corbin* on the law of conspiracy. The Second Circuit has taken the same position as does the Tenth Circuit in this case—that the "conduct" at issue in a conspiracy prosecution is not the agreement itself, but is the conduct from which the government asks the jury to infer the existence of an agreement. See *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527; *United States* v. *Gambino*, 920 F.2d 1108, 1112 (2d Cir. 1990). The Eleventh Circuit, on the other hand, has disagreed with the position adopted by the courts of appeals in this case and in *Calderone*. In *United States* v. *Gonzalez*, 921 F.2d 1530, 1538 (11th Cir. 1991), the court distinguished *Calderone* in a RICO conspiracy case, holding that the "conduct" in a RICO conspiracy case was the defendant's agreement, while the "conduct" charged in a previous prosecution for substantive narcotics offenses was the "criminal activity of the importation and distribution of contraband substances."[2] As the Eleventh Circuit noted, "[t]he mere fact that [the agreement and the substantive conduct] are part of the same 'transaction' or can be proven by the same 'evidence' is not sufficient to bar successive prosecutions under the language in *Grady*." *Ibid.* See also *United States* v. *Esposito*, 912 F.2d 60, 65 (3d Cir. 1990).

[2] Because *Gonzalez* was a RICO conspiracy case, and *Calderone* involved a drug conspiracy, the Eleventh Circuit merely "distinguish[ed] the dicta underlying *Calderone*" (921 F.2d at 1539) and found it unnecessary to decide whether it disagreed with the result in *Calderone*. The Eleventh Circuit noted, however, that "the Second Circuit would appear to disagree with part of our holding above * * * that the conspiratorial agreement and any actions in furtherance of it, are in fact distinguishable conduct." 921 F.2d at 1538 n.12.

The courts of appeals are thus in disagreement over the effect of *Grady* on longstanding principles of conspiracy law and the well-settled legal doctrine permitting the successive prosecution of a conspiracy and the substantive offenses committed pursuant to that conspiracy. Review by this Court is warranted to resolve that conflict.

2. In addition to reversing respondent's conspiracy conviction, the court of appeals also reversed his convictions on five of the substantive counts. None of those counts charge respondent with a conspiracy, and the court's decision with respect to those counts thus does not depend on its holding concerning the "conduct" at issue in a conspiracy prosecution. Rather, the court based its holding on the fact that the conduct charged in those substantive counts had been the subject of evidence introduced against respondent under Rule 404(b) in the Missouri prosecution.

In *Dowling* v. *United States*, 110 S. Ct. 668 (1990), this Court held that evidence of a crime of which a defendant has been acquitted may be introduced against the defendant in a later prosecution for another offense. That principle dictates the result here: that two crimes do not become the "same offense" for double jeopardy purposes merely because the evidence that establishes the first crime is also relevant to prove the second.

To be sure, there are two possible distinctions between *Dowling* and this case. First, *Dowling* involved a prior acquittal, while this case involves a prior conviction. Yet, that distinction suggests that the result in this case should follow *a fortiori* from the result in

Dowling. *Dowling* held that the government may use evidence that was introduced in a prior prosecution of the same defendant, in which the defendant had been *acquitted*; surely it follows that the government may use evidence that was introduced in a prior prosecution in which the same defendant had been *convicted*.

Second, in *Dowling* the defendant was first prosecuted for the prior act of misconduct and then prosecuted for other conduct of which the prior misconduct was merely relevant evidence. In this case, the order of the prosecutions was reversed. Yet that distinction, too, does not suggest any real difference between this case and *Dowling*. If, as in *Dowling*, evidence of conduct for which a defendant has already been prosecuted may be introduced at a later trial on another charge, then evidence of conduct for which the defendant has never been prosecuted, but which has been introduced in a prior trial of the same defendant, is surely admissible in a later trial for that conduct. The underlying principle in both cases is that the introduction of relevant evidence of particular misconduct is not the same thing as prosecution for that conduct. As Judge Anderson explained (App., *infra*, 29a n.6), any suggestion to the contrary is inconsistent with this Court's holding in *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988), that a jury may accept similar act evidence if it "can reasonably conclude that the act occurred and that the defendant was an actor"—a standard substantially lower than the "beyond a reasonable doubt" standard that governs the jury's findings that a defendant committed the acts charged in a criminal indictment.

The decision in this case is therefore inconsistent with *Dowling*, as well as with the numerous pre-

Dowling appellate decisions that reached the same result as *Dowling*,[3] and it is erroneous unless *Grady* v. *Corbin* has effectively overruled *Dowling*. We agree with Judge Anderson that *Grady* has had no such effect. If *Grady* is interpreted to foreclose prosecution for an offense simply because evidence of the commission of that offense was relevant to a prosecution for a different crime, the double jeopardy rule of *Grady* will have been converted into a version of the "same evidence" test: to avoid the bar of double jeopardy, the government will have to avoid any reference in one prosecution to acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution. That is a result that the Court in *Grady* appears to have disclaimed. See 110 S. Ct. at 2093 & n.12 ("[T]he presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding."). Nonetheless, the breadth of that disclaimer is subject to debate, as the conflicting opinions in this case indicate. Review by this Court is needed to resolve this important issue of double jeopardy law.

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[3] See, *e.g.*, *Flittie* v. *Solem*, 775 F.2d 933, 942 (8th Cir. 1985) (en banc), cert. denied, 475 U.S. 1025 (1986); *United States* v. *Castro-Castro*, 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); *United States* v. *Van Cleave*, 599 F.2d 954, 957 (10th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1991

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-7058

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

FRANK DENNIS FELIX, DEFENDANT-APPELLANT.

[Filed Feb. 28, 1991]

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 89-16-CR)

Before HOLLOWAY, Chief Judge, SEYMOUR and ANDERSON, Circuit Judges.

HOLLOWAY, Chief Judge.

In No. 89-7058, defendant Felix appeals his conviction in the United States District Court, Eastern District of Oklahoma, on various counts of a multi-count indictment charging him, *inter alia*, with con-

spiracy, manufacture, and possession with intent to distribute methamphetamine. He alleges that this conviction forced him to "run the gauntlet" again following a previous conviction in the United States District Court, Western District of Missouri, for a single count of attempt-to-manufacture methamphetamine, in violation of the protections afforded by the Double Jeopardy Clause as recently construed in *Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084 (1990). We agree that Felix has shown that his conviction on several counts in the Oklahoma trial entailed impermissible successive prosecutions for conduct underlying his Missouri conviction, and therefore we reverse his conviction on particular counts as enumerated below.

I

Defendant Felix was convicted following a jury trial in the Eastern District of Oklahoma for violations of 21 U.S.C. §§ 846 and 841(a)(1) ("the Oklahoma trial").[1] He had previously been convicted in

[1] On February 16, 1989, Felix was named in an eleven count indictment. The specific charges against Felix were as follows:

Count 1 charged Felix and others with conspiring to knowingly and intentionally manufacture methamphetamine; to knowingly and intentionally possess the same with intent to distribute; and to knowingly and intentionally distribute the same drug. This conspiracy was alleged to have occurred from on or about May 1, 1987, continuously to on or about August 31, 1987, in the Eastern District of Oklahoma and elsewhere;

Count 2 charged Felix and others with unlawfully, knowingly and intentionally manufacturing methamphetamine on or about July 13, 1987, in the Eastern District of Oklahoma:

Count 3 alleged that Felix and others possessed with intent

the Western District of Missouri on a single count of attempt-to-manufacture methamphetamine, in violation of §§ 841(a)(1) and 846, ("the Missouri trial").[2] Both convictions arose from the following course of conduct and events:

to distribute five and a quarter pounds of methamphetamine on or about July 13, 1987;

Count 4 charged that Felix and others on or about July 13, 1987, knowingly and intentionally possessed approximately four gallons of methamphetamine oil with intent to manufacture methamphetamine;

Count 5 alleged that Felix and others on July 13, 1987, manufactured phenylacetone;

Count 6 alleged that Felix and codefendant Pinter from on or about June 1, 1987 to on or about July 13, 1987, in the Eastern District of Oklahoma, maintained and/or made available a place and enclosure for manufacturing methamphetamine/amphetamine;

Count 9 alleged that on or about June 21, 1987, in the Eastern District of Oklahoma and elsewhere, Felix traveled in interstate commerce from Texas to the Eastern District of Oklahoma and elsewhere with intent to promote, etc. the manufacture of methamphetamine/amphetamine; and thereafter attempted to promote, etc. the management, establishment, etc. of the manufacture of methamphetamine/amphetamine;

Count 10 charged that on or about July 13, 1987, in the Eastern District of Oklahoma and elsewhere, Felix willfully traveled in interstate commerce from Texas to the Eastern District of Oklahoma and elsewhere with [*sic*] intent to promote, etc. the promotion, or carrying on manufacture by traveling from Texas to the Eastern District of Oklahoma, and thereafter attempted to promote, etc. the promotion, etc. the manufacture of methamphetamine.

Defendant Felix was convicted on all these counts and received lengthy sentences.

[2] The single count Missouri indictment, dated September 15, 1987, charged Felix with attempting to manufacture meth-

Sometime in the Spring of 1987, a meeting (or meetings) between defendant Felix and unindicted co-conspirator Paul Roach resulted in an agreement whereby Felix would provide financing and other support to Roach, in exchange for Roach's instruction and assistance in "cooking" methamphetamine. A laboratory for the illegal enterprise was established in mobile trailers parked on an oil lease near Beggs, Oklahoma.

Felix and Roach obtained the chemicals and equipment for the Beggs lab in Tulsa, from George Dwinnells, a DEA confidential informant operating out of Tulsa Scientific, a chemical company. As a result of information provided by Dwinnells, the DEA seized the unattended Beggs lab on July 13, 1987, while a "cook" was in progress. Seized at the site were methamphetamine oil, illegal precursor chemicals, manufacturing equipment, and other evidence, some of which inculpated Felix.

Shortly thereafter, Felix phoned Dwinnells and arranged a meeting in a Tulsa bar. At the bar, under the observation of DEA agents, Felix ordered more chemicals and equipment from Dwinnells, secured by a $7,500 down payment. At Felix' behest, Dwinnells transported the newly purchased chemicals and equipment by trailer to a hotel in Joplin, Missouri. Under the watchful eyes of the DEA, tipped off by Dwinnells, a controlled transfer of the trailer and its contents to Felix occurred. He was arrested shortly thereafter.

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amphetamine from on or about August 26, 1987, to on or about August 31, 1987, in the Western District of Missouri and elsewhere. Felix' conviction on this single count conviction was affirmed by the Eighth Circuit in *United States v. Felix*, 867 F.2d 1068 (8th Cir. 1989).

Felix was tried before a jury on the attempt-to-manufacture charge in Springfield, Missouri on November 30, 1987 and convicted. Before his April 1989 Oklahoma jury trial, Felix moved to dismiss the instant indictment on double jeopardy grounds arising from the Missouri conviction. *See* Defendant Felix' Plea of Double Jeopardy and Motion To Dismiss The Indictment, TR. Vol I, Tab 2. The trial judge in the Eastern District of Oklahoma denied Felix' motion by Order, dated March 20, 1989, holding:

> The § 846 offense in this indictment is for *Conspiracy* to Manufacture, in the Eastern District of Oklahoma. . . . None of the other substantive counts charge *Attempting* To Manufacture, and they are all alleged to have occurred in the Eastern District of Oklahoma. The court finds the offenses herein are separate and distinct from defendant's conviction in Missouri, and his double jeopardy argument is without merit.

TR. Vol. I, Tab 24, at 9 (emphasis in original).

II

On appeal, Felix raises only one issue—that he was subjected to double jeopardy in violation of the Fifth Amendment, specifically the guarantee against being twice put on trial for the same offense. He premises this claim of error on the denial of his motion to dismiss based on double jeopardy grounds. For reasons given below, we are convinced that the Double Jeopardy Clause as interpreted recently in *Grady v. Corbin*, —— U.S. ——, 110 S.Ct. [2084] (1990), requires the reversal of most of Felix' convictions. The trial judge did not have the benefit of that recent opinion.

The Double Jeopardy Clause affords three guarantees: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). Moreover, "it has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition." *Brown v. Ohio*, 432 U.S. 161, 164 (1977). It is the second protection that Felix relies upon, namely, that he not be forced to undergo successive prosecutions for the same conduct.

General double jeopardy analysis earlier focused on the so-called traditional "*Blockburger* test" which states that:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304 (1932). The focus of that test is on the elements of the crimes, and "[i]f each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Ianelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (citation omitted).

Recently, two significant opinions from the Supreme Court have shaped the double jeopardy analysis—first, *Dowling v. United States*, —— U.S. ——, 110 S.Ct. 668 (1990), decided January 10, and second, the *Grady* case decided on May 29, 1990. *Grady* in particular makes clear that the Double Jeopardy Clause protections extend beyond the limitations expressed in the much earlier *Blockburger* test.

In *Dowling*, the defendant had been convicted of bank robbery in part on the basis of testimony of Mrs. Henry. Although she was not involved in the bank incident itself, her testimony supported the government's modus operandi evidence and established a link between Dowling and an alleged accomplice at the bank. There the bank robber had worn a mask and carried a small pistol. Mrs. Henry testified that during a burglary attempt at her home two weeks earlier, she had unmasked a man that she said was Dowling. The man she struggled with was similarly, although not identically, masked and armed as the bank robber. In a previous trial for burglary where Mrs. Henry testified as an eyewitness, Dowling had been acquitted.

The Court rejected a claim that the Double Jeopardy Clause and the Due Process Clause barred the use of Mrs. Henry's testimony at the bank robbery trial in light of the earlier acquittal. Writing for the majority, Justice White made clear that "The issue is the inadmissibility of Henry's testimony." The majority rejected Dowling's reliance on the double jeopardy principles established in *Ashe v. Swenson*, 397 U.S. 436 (1970), because in the *Dowling* case, the prior acquittal "did not determine an ultimate issue in the present case."

Dowling's holding rests on two basic reasons. First, there was a lower standard of proof applicable to the use of Ms. Henry's modus operandi evidence than in the first trial involving Dowling. A jury might reasonably conclude that Dowling was the masked man

who entered Mrs. Henry's home and gave Rule 404(b) application to the evidence, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged in the first trial. Second, the Court deemed the evidence admissible because Dowling had not demonstrated that his acquittal in his first trial represented a jury determination that he was one of the men who entered Mrs. Henry's home sufficient to justify application of *Ashe's* collateral estoppel protection. 110 S.Ct. at 674. Dowling had actually not disputed his identity and instead argued that he was merely in Mrs. Henry's home to retrieve money from an individual in the house. Thus, there was not the sharp determination of an issue in favor of Dowling as there was in *Ashe*.

Grady v. Corbin is a Double Jeopardy Clause application of much broader scope. In *Grady*, defendant Corbin, who had been drinking, drove his car across the center line and struck two oncoming vehicles, killing one person and injuring another. Although the assistant district attorney had responded to the accident and started an investigation, nevertheless, Corbin was issued two uniform traffic tickets for misdemeanor driving while intoxicated ("DWI") and failing to keep right of the median. Despite the investigation, Corbin's trial on the traffic tickets proceeded unimpeded. When the traffic court case was called, the prosecuting attorney was unaware that a death was involved and failed to object to the imposition of a minimal sentence after Corbin pled guilty.

Two months later, a grand jury indicted Corbin for reckless manslaughter, vehicular manslaughter, criminally negligent homicide, third degree assault, and DWI. In the bill of particulars, the three acts pled to establish the homicide and assault charges were

(1) intoxicated driving, (2) failing to keep right of the median, and (3) driving too fast for weather and road conditions. Corbin's motion to dismiss the indictment on double jeopardy grounds was rejected, and he sought a writ of prohibition to bar prosecution on all counts. The Appellate Division denied the writ, but the New York Court of Appeals reversed. The DWI count was found barred by the state constitution, and the manslaughter counts were found to violate *Blockburger*, as DWI was deemed a lesser included offense under state law. The remaining homicide and assault counts were barred on Fifth Amendment grounds, and were the sole subject of the Supreme Court's review.

The Court barred Corbin's prosecution, using a two-step, double jeopardy analysis. The first step is the traditional analysis:

> To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional *Blockburger* test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred.

Grady at 2090 (citing *Brown*). The Court noted, however, that the "*Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." 110 S.Ct. at 2092 (quoting *Brown v. Ohio*, 432 U.S. 161, 166-167 n.6 (1977)). The *Grady* opinion clearly defined a second step to the double jeopardy analysis:

> Thus, a subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in [*Illinois v. Vitale*], the Double Jeop-

> ardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the state will prove, not the evidence the state will use to prove that conduct. As we have held, the presence of specific evidence in one trial does not forever prevent the governmnt from introducing that same evidence in a subsequent proceeding. *See Dowling v. United States*, 493 U.S. ——, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)."

110 S.Ct. at 2093.[3]

As yet, few appellate courts have construed *Grady*,[4] but its intended breadth is obvious from its language.

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[3] Like *Grady*, this circuit has also relied on the reasoning in *Vitale* to expand double jeopardy analysis beyond the four corners of *Blockburger*'s facts. *See United States v. Genser*, 710 F.2d 1426, 1428-31 (10th Cir. 1983) (reversing the defendant's conviction on double jeopardy grounds because the successively prosecuted charges of "distribution" and "dispensation" both required proof of "knowing or intentional delivery of a controlled substance"). *Genser* itself calls for the reversal of convictions as outline below.

[4] *See, e.g., United States v. Pungitore*, 810 F.2d 1084 (3d Cir. 1990) (limiting *Grady* to "single act" crimes); *United States v. Esposito*, 912 F.2d 60 (3d Cir. 1990) (same); *United States v. Russo*, 906 F.2d 77 (2nd Cir. 1990) (per curiam) (reversing the defendant's conviction of obstructing justice under *Grady* where the conviction followed a previous acquittal for RICO conspiracy using the identical obstruction charge as a predicate offense).

The Third Circuit has said that "the language employed by the [*Grady*] Court in its formulation of the 'same conduct' test could be interpreted as extending double jeopardy protection to all situations where the government intends again to prove conduct constituting an offense subject to an earlier conviction." *United States v. Pungitore*, 910 F.2d 1084, 1110 (3d Cir. 1990). The Third Circuit, however, declined to adopt that stance believing that '[t]he double jeopardy analysis in *Brown* and *Grady*, . . ., cannot easily be transposed to the RICO context[.]" *Id.* We note, however, that the Third Circuit's analysis stems from an approach to double jeopardy issues that this circuit has already rejected, and is thus inapposite.[5]

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[5] The Third Circuit's approach bifurcates those cases which involve multiple criminal acts falling within a single statutory scheme (*i.e.*, CCE or RICO) from what may be deemed "single act" cases. *See, e.g., Pungitore* at 1110-11. Under this approach, *Garrett v. United States*, 471 U.S. 773 (1985) (holding that conviction of both CCE and the underlying predicate offense does not violate double jeopardy) controls the former, and *Grady* controls only the latter. This Court, however, has already rejected adoption of different rules based on the ability to distinguish a series of events from a single event in the double jeopardy context. *See e.g., United States v. Savaiano*, 843 F.2d 1280, 1292-93 (10th Cir. 1988) (refusing to adopt the Ninth Circuit's "single act" rule on consecutive sentences because of the "difficulty in ascertaining what is and what is not a single course of conduct"). Moreover, the Third Circuit's view is predicated on statutory delineation of separable acts. We are mindful, however, of the Supreme Court's statement in *Brown v. Ohio*, that: "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown*, 432 U.S. at 161. Thus, consistency with

We are in accord with the more recent application of *Grady* in *United States v. Calderone and Catalano*, Nos. 90-1122, 90-1123 (2nd Cir. Oct. 24, 1990). There the Second Circuit reversed the district court's denial of defendants' motion to dismiss the indictment on double jeopardy grounds, one judge dissenting. At their first trial, Calderone and Catalano had been granted a directed verdict based on the insufficiency of the evidence against them in an international, multi-drug smuggling conspiracy trial. Immediately after the directed verdict, the government filed a new indictment against them. The second indictment charged a narrower conspiracy to distribute heroin in New York City, along with 24 counts of telephone use to facilitate the crimes, and 3 counts of distribution. This "smaller" conspiracy overlapped the earlier one as to time and some overt acts.

The *Calderone* court held that "the 'same conduct' test announced in *Grady* bars prosecution of all counts of the . . . indictment." Slip op. at 7072. The court, as we do, found the scope of *Grady* to be of some breadth: "the 'same conduct' test announced in *Grady* applies to all double jeopardy claims arising in the context of successive prosecutions." Slip op. at 7075. More importantly, *Calderone* rejected the same argument advanced by the government here, namely, that the evidence presented at both trials was not used

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Savaiano, at a minimum, justifies our departure from the Third Circuit's approach.

Conversely, even within the Third Circuit's framework, *Grady* still controls here. A federal drug conspiracy charge does not require proof of overt acts. Thus, this type of conspiracy is inherently the "single act" sort of crime which the Third Circuit finds controlled by *Grady*. *See Pungitore*, 910 F.2d at 1110-11.

to prove the same conduct because the conduct proven was a district conspiratorial agreement. *See* Appellee's brief at 16-17. As explained in *Calderone*:

> [T]he "agreement" in nearly all conspiracy prosecutions is not proved directly, such as by the testimony of conspirators that "we agree to sell narcotics." Rather, the "agreement" is simply alleged, and to prove its existence the government presents evidence of the conspirator's conduct—what they said and did—and asks the jury to infer from this conduct that the criminal agreement has been established. The conduct in most conspiracy cases . . . is the focus of the case. Under *Grady*, this conduct may not be prosecuted a second time in order to establish an "agreement" that differs from the first crime only in that the indictment happens to describe it differently.

Slip op. at 7075-76. The government, then, cannot avoid the strictures of the Double Clause merely by indicting and convicting Felix on statutorily distinct charges.

As shown below, the fact that Felix' two trials constitute successive prosecutions arising from virtually the same conduct involving the same actors and overlapping time frames signals the need to apply the *Grady* double jeopardy analysis. A court should carefully apply double jeopardy analysis where a defendant's constitutional rights are threatened by prosecutors who have the opportunity to draft indictments in which they can allege *apparently* separate criminal conduct. *See Calderone*, slip op. 90-1122, 1123 at 7076, 7077 (Newman, J., concurring).

Considering, as we must, the proper application of both *Grady* and *Dowling*, we are persuaded that

Grady lays down the principle which applies with special force here. *Dowling* and *Grady* are not contradictory and we can, and must, give full application to both holdings. *Dowling* concerned, as noted, the admissibility of evidence in conformity with the collateral estoppel principle of *Ashe*[6]; *Grady* concerned the protection afforded by the Double Jeopardy Clause from successive prosecutions for the same conduct which is violative of criminal statutes. It is this latter protection under the Clause which is implicated here and this causes us to focus mainly on the teaching of *Grady*. We now turn to the facts of the instant case which we will consider under these principles.

III

Consideration of the record of the Oklahoma trial and the evidence summarized by the Eighth Circuit in the Missouri trial shows significant duplication of the conduct proved to establish the Missouri offense and most of the Oklahoma convictions. Evidence as to such conduct comes from the testimony of the following witnesses, presented at both trials: Paul Roach (Government Witness); George Dwinnells (DEA Confidential Informant); John Coonce (DEA agent); and Carolyn Ruybal (DEA chemist). *See generally Felix*, 867 F.2d at 1070-71; TR Vol. V, 317-76, 475-82; TR Vol. VI, 792-93; TR Vol. VIII, 898, 912.

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[6] The only link between the two crimes in *Dowling* was the fact that the defendant had allegedly been identified at the time of both of the crimes as similarly garbed. There was no same act or conduct at issue in the two prosecutions for which Dowling could be criminally convicted. Rather, Dowling was charged with separate crimes, arising out of separate conduct.

The Eighth Circuit described the conduct found sufficient to convict Felix of the attempt to manufacture methamphetamine, in part, as follows:

> With regard to the first element [criminal intent], evidence was presented that Felix actively learned to cook methamphetamine, toward that end supplied his instructor with methamphetamine-making chemicals and equipment, and eventually made methamphetamine at a lab near Beggs, Oklahoma. . . . Evidence further showed that Felix subsequently ordered enough chemicals and equipment to make several kilos of methamphetamine and that, upon receipt of the items, he planned to produce the drug at a lab of his own. Concerning the second element of attempt [a substantial step toward commission of the substantive attempt offense], . . . the Government's evidence show that, after learning how to make methamphetamine, Felix ordered the necessary chemicals and equipment, had a trailer full of the chemicals and equipment delivered to him, and paid $7,500 for the delivered goods. . . .

Felix, 867 F.2d at 1071 (citation omitted).

In the subsequent prosecution in Oklahoma, a number of the counts in the indictment were based on proof of the same conduct. As to Count 1, the conspiracy charge, the duplication was extensive, contrary to *Grady*. In both trials it was proven that Felix met with Roach and agreed to furnish him chemicals and equipment so that under Roach's tutelage, methamphetamine could be produced. See *Felix*, 867 F.2d at 1070; and here, TR. Vol V, 317, 337-39, 341, 357, 373-76. Furthermore, it was proven

at both trials that Felix met Dwinnels in a Tulsa bar, informed him of the Beggs lab bust, and gave him a $7,500 down payment with an order for chemicals and equipment to manufacture methamphetamine. Felix later called to increase his order, and instructed Dwinnells to deliver the chemicals and equipment to him in Joplin, Missouri. Felix then met Dwinnells in Joplin and took possession of the goods. *See Felix*, 867 F.2d at 1070-71 and n.4; and here, TR. Vol. V, 475-82; TR. Vol. VI, 792-93. This conduct was alleged in Overt Acts 17 and 18 of the Oklahoma conspiracy charge, Count 1, and was used to show that Felix had conspired to manufacture methamphetamine in the Oklahoma case.[7] Previously

[7] We are mindful that 21 U.S.C. § 846 does not require proof of an overt act in the prosecution of a drug conspiracy. That does not mean, however, that we should disregard the conduct represented by the overt acts pled in the instant Oklahoma indictment. The proof of such conduct as is alleged in the overt acts in the Oklahoma case tended to show the criminal agreement for the conspiracy charged in Oklahoma, and thus was a significant part of the proof in the Eastern District of Oklahoma. Some of the acts occurred elsewhere, but that was contemplated by the Oklahoma indictment which alleged in Court 1 a conspiracy in the Eastern District of Oklahoma "and elsewhere" from on or about May 1, 1987, continuously to on or about August 1, 1987.

The conduct alleged as the overt acts was before the Oklahoma trial jury as the very "actions in furtherance of that conspiracy," *see* TR. Vol. VII, 1001. Furthermore the government's closing argument expressly emphasized the relevance of the conduct described in overt acts 17 and 18 to the jury's determination of guilt. *See id.* at 1002, 1018. And DEA chemist Ruybal, who testified in both trials, conceded that the physical evidence admitted here included "the identical exhibits introduced at [the Missouri] proceeding[.]" *Id.* at 912. The indictment was read to the jury at the beginning of trial and furnished to the jury with the instructions. VII

in Missouri, however, the identical conduct established both the intent and "substantial step" elements of the attempt to manufacture methamphetamine charge.

In fact, the government's response below to Felix' motion to dismiss on double jeopardy ground makes clear the violation of the *Grady* principles:

> The possession of chemicals and equipment necessary to the manufacture of methamphetamine, overt acts 17 and 18 in the present indictment, *was the activity leading to defendant's conviction for attempted manufacture in the Western District of Missouri.*

Government Response below, p. 2 (emphasis added).

In addition to the overlap in the conduct giving rise to the successive prosecutions, the two offenses did not involve distinct persons, places, or times. Both prosecutions focused on Felix and Roach as the actors. Both prosecutions presented evidence of acts occurring outside the borders of the respective states in which the trials took place. The instant indictment alleged that the conspiracy took place in the "Eastern District of Oklahoma *and elsewhere.*" *United States v. Felix*, Indictment No. 89-16-CR

R. 1070. Thus, Felix' conduct as to the purchase of chemicals and equipment in the Tulsa bar and the delivery of the same in Joplin, Missouri, was proven and argued in the successive trials as a basis for the successive convictions.

This circumstance is similar to that discussed by Judge Newman in his concurring opinion in *United States v. Calderone and Catalano*, 917 F.2d at ——. In *Calderone*, Judge Newman said that the government was contending that the defendant "committed these [overt] acts in furtherance of the Adamita conspiracy and that these acts showed their participation in that conspiracy."

(emphasis added). Similarly, the indictment alleged that one of the means of the conspiracy was to manufacture drugs for distribution in the "Eastern District of Oklahoma *and elsewhere*." *Id.* (emphasis added). Overt act No. 18 alleged that on August 31, 1987, Felix, "while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." Finally, the relevant time frames of the two indictments also overlap. The Missouri prosecution was premised on conduct that occurred from the spring of 1987 to August 31, 1987. *Felix*, 867 F.2d at 1070. The Oklahoma prosecution was premised on conduct that occurred from "about" May 1, 1987 to August 31, 1987 (Count 1); and on July 13, 1987 (Counts 2, 3, 4, and 5).

Accordingly, under the clear principle pronounced in *Grady* against successive prosecutions for the same conduct, we hold that the successive prosecution of Felix in Oklahoma for the same conduct for which he was previously convicted in Missouri violated the Double Jeopardy Clause. Thus the Count 1 conspiracy conviction of Felix in the instant case cannot stand.

As to the substantive offenses charged in Counts 2 through 5, in both trials it was proven that Roach and Felix bought chemicals and equipment from Dwinnells at Tulsa Scientific for the purpose of manufacturing and distributing methamphetamine. *See Felix*, 867 F.2d at 1070-71; and here, TR. Vol. V, 346-48, 356. They used these chemicals and equipment to create precursor chemicals (*e.g.*, methamphetamine oil and phenyllacetone), which in turn were subsequently used to generate methamphetamine at the Beggs, Oklahoma lab. *Felix*, 867 F.2d at 1070-71; and here, TR. Vol. V, 346-48, 354-56, 360-

62, 367-68, 370-71. This conduct served to establish the intent element of the attempt to manufacture methamphetamine in the Missouri trial; it also served as factual support for Felix' convictions in Oklahoma of possessing precursor chemicals (Counts 4 and 5), and manufacturing and possessing with intent to distribute methamphetamine (Counts 2 and 3). Hence Felix' conviction on these Counts must also be reversed.

Likewise Count 6 of the Oklahoma indictment clearly was a successive prosecution for conduct that was the subject of the Missouri prosecution. Count 6 here charged that from on or about June 1, 1987, in the Eastern District of Oklahoma, Felix and co-defendant Pinter maintained and/or made available a place and enclosure for manufacturing methamphetamine/amphetamine. Proof during the Oklahoma trial included Roach's testimony that he knew Felix in about May 1987, V R. 316; that in Texas Felix discussed finding a place to set up "the lab," id. at 337; Felix said he wanted Roach to take some of the glassware to Okmulgee, Oklahoma; Roach met a man named B. J. (codefendant Pinter) there and they went to a location near Beggs, Oklahoma (which is in Okmulgee, County), id. at 344; Felix showed up and they discussed the glassware, id. at 346-47; Felix and Roach went to Tulsa and bought glassware, id. at 347-48; after Father's Day, Felix and Roach had conversations at the lab site and Felix and Roach "just kind of worked together on [throwing away trash at the lab site]." Id. at 368. Dennis [Felix] paid Roach $4,000 cash for Roach's part of the lab work; they did 4, 5 or may 6 cooks. Id. at 370.

This proof offered to support Count 6 of the Oklahoma indictment was close to that outlined in the Eighth Circuit *Felix* opinion on Roach's testimony

that Felix furnished Roach methamphetamine-making chemicals during the Spring of 1987; that he and Felix bought chemicals and equipment in Tulsa and eventually cooked methamphetamine in a trailer near Beggs; and that on July 13, 1987, officers seized the trailer near Beggs. *Felix*, 867 F.2d at 1070. The evidence of this conduct was identified by the Eighth Circuit as presented in connection with the essential elements of the attempt to manufacture methamphetamine prosecution in the Missouri federal case: (1) an intent to engage in the criminal conduct; and (2) conduct constituting a "substantial step" toward the substantive offense, strongly corroborating the actor's criminal intent. *Felix*, 867 F.2d at 1071. The subsequent Oklahoma trial on such evidence of knowingly maintaining a place for manufacturing the controlled substance (see allegations of Count 6, note 1, *supra*) thus subjected Felix to a successive trial for the same conduct, contrary to *Grady*. Thus the Count 6 conviction also cannot stand.

We conclude, however, that the defendant Felix has not shown grounds for disturbing his convictions and sentences on Counts 9 and 10. The defendant bears the burden of proving a double jeopardy claim. *United States v. Cardall*, 885 F.2d 656, 665 (10th Cir. 1989). Count 9 charged interstate travel on or about June 21, 1987 from Texas to the Eastern District of Oklahoma and elsewhere with intent to promote, etc., the management, etc., of manufacture of methamphetamine/amphetamine. Count 10 made similar allegations of interstate travel on or about July 13, 1987, from Texas to the Eastern District of Oklahoma and elsewhere with the intent to promote, etc., the same unlawful conduct. The closest that the conduct outlined in the Eighth Circuit *Felix* opinion

gets to the conduct charged in the instant Counts 9 and 10 is presented by an allegation that on July 13, 1987, law enforcement officers seized the trailer near Beggs, Oklahoma; that Felix instructed Dwinnells to deliver chemicals and equipment to the Joplin, Missouri Holiday Inn; that Felix and Dwinnells met at that motel where Felix had rented a room; and that a controlled delivery was arranged to be made in Joplin on August 31, 1987. 867 F.2d at 1070-71.

We cannot agree that the double jeopardy claim was established as to the Count 9 and 10 convictions and sentences, which was a burden the defendant Felix had to carry.[8]

In sum, we conclude that the Double Jeopardy Clause of the Fifth Amendment barred defendant Felix' successive prosecution on Counts 1, 2, 3, 4, 5, and 6, of the Oklahoma indictment and his convictions, sentences, and special $50 assessments on those Counts are REVERSED. His convictions on Counts 9 and 10 need not be disturbed and are AFFIRMED; however, the case is remanded for re-sentencing on said Counts 9 and 10.

IT IS SO ORDERED.

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[8] At first glance, the remaining counts: 9 and 10 (interstate travel to promote manufacturing) seem akin to the telephone counts also barred in *Calderone*. Arguably, they also "allege[] as an element the facilitation of the conspiracy charged in count one." Slip op. at 7086 (Newman, J., concurring). We are not, however, inclined to go so far on the record before this Court.

ANDERSON, Circuit Judge, dissenting:

I respectfully dissent.

Frank Dennis Felix was convicted in the United States District Court for the Western District of Missouri of attempting to manufacture methamphetamine. *See United States v. Felix*, 867 F.2d 1068, 1070 (8th Cir. 1989) (affirming the conviction). But nothing in the Double Jeopardy Clause, or the Supreme Court jurisprudence interpreting that provision, barred Felix's subsequent prosecution in the United States District Court for the Eastern District of Oklahoma for geographically and temporally separate acts that violated federal drug laws. In hold that the Double Jeopardy Clause requires reversal of six of Felix's drug convictions, the majority overlooks the plain language of the Supreme Court's recent holding in *Grady v. Corbin*, 110 S.Ct. 2084 (1990), and adopts a dangerously broad interpretation of the Double Jeopardy Clause.

I. The *Grady* Rule

The majority relies upon the Supreme Court's recent decision in *Grady v. Corbin*, 110 S.Ct. 2084 (1990). This reliance is misplaced. The majority opinion mischaracterizes *Grady*'s rule. The majority refers to a bar against: "significant duplication of conduct proved," Proposed Majority Opinion at 13, "counts in the indictment . . . based on proof of the same conduct," *id.* at 14, and "successive trial[s] for the same conduct." *Id.* at 18. The majority similarly cites "the clear principle pronounced in *Grady* against successive prosecutions for the same conduct." *Id.* at 16.

The *Grady* Court, however, did not establish a "same conduct" rule.[1] By its plain language, *Grady* only bars subsequent prosecutions

> in which the government, *to establish an essential element* of an offense charged in that prosecution, will prove *conduct that constitutes an offense for which the defendant has already been prosecuted.*

Grady v. Corbin, 110 S.Ct. at 2093 (emphasis added). This language comprises several crucial elements, none of which the majority discusses or applies because it lumps them together into a "same conduct" test. The majority further confuses the matter by switching, with no explanation, to a comparison of the evidence presented at each trial, an approach explicitly rejected by *Grady*. 110 S.Ct. at 2093.

Under *Grady*'s plain language, the proper approach begins by identifying the conduct sought to be proved in the instant prosecution, as set forth in the indictment. Once that is ascertained, two important

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[1] The majority begins its double jeopardy analysis on the wrong foot when it equates the term "same offense" found in *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), with "same conduct." Proposed Majority Opinion at 5. Although both the Second Circuit, *United States v. Calderone*, 917 F.2d 717 (1990), and the Third Circuit, *United States v. Pungitore*, 910 F.2d 1084 (1990), also style the *Grady* rule as the "same conduct" test, they do not apply the majority's simplified analysis to the facts of those cases. As the majority opinion evidences, this characterization risks misapplication of the rule because it suggests that the Double Jeopardy Clause analysis entails a simple comparison between any conduct that the government seeks to prove in two prosecutions.

questions must be answered: (1) is this conduct that constitutes an offense for which the defendant has already been prosecuted? and (2) is it being proven to establish an essential element of the offense for which the defendant is being prosecuted? The *Grady* rule bars the instant prosecution *only* if the answer to *both* questions is affirmative. There are important sub-parts to each of the two questions. Under the first question, for example, the conduct may not "constitute an offense." Or, even if it does constitute an offense, it may not have been an offense "for which the defendant had already been prosecuted." Under the second question, it may be that the conduct does not "establish" an essential element, or it may establish an element that is not "essential."

It is not for this court to re-write *Grady*'s rule. We must give meaning to *each* of its elements. When that is done, the rule does not bar Felix's prosecution in Oklahoma.

II. Counts 2 though 6

The majority reverses Felix's convictions on Counts 2 though 6. The stated rationale is that much of Felix's conduct serving as the basis for these Oklahoma convictions has been introduced into evidence at Felix's trial in Missouri.

But the *Grady* rule does not bar subsequent proof of *all* conduct introduced into evidence in a previous trial. *Grady* only bars the prosecution in a subsequent trial from proving "conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 110 S.Ct. at 2093. As the rule suggests, the conduct alleged in the subsequent prosecution in *Grady* constituted separately

cognizable offenses for which Corbin had already been prosecuted.[2]

In contrast, Felix had never been prosecuted for the conduct alleged in Counts 2 through 6 of the Oklahoma prosecution. Each of those counts was based on Felix's conduct on or before July 13, 1987, in establishing and operating the methamphetamine lab in Beggs, Oklahoma. R. Vol. I at Tab 1. In the Missouri trial, however, Felix had only been prosecuted for his conduct "[f]rom on or about August 26, 1987, to on or about August 31, 1987," over a month *after* the July 13 DEA seizure of the Beggs lab. Missouri Indictment, R. Supp. Vol. II at 1.

Evidence regarding Felix's involvement with the Beggs lab was admitted in the Missouri trial under Rule 404(b) of the Federal Rules of Evidence[3] as "highly probative of Felix's knowledge and intent." *United States v. Felix*, 867 F.2d 1068, 1072-73 (8th Cir. 1989). In its instructions to the jury, the District Court in Missouri emphasized that Felix was not being prosecuted for the earlier Oklahoma acts:

> You have heard evidence that the defendant *previously* committed a crime *similar* to the one charged in this case. You may not use this *evidence* to decide whether the defendant carried out the *physical acts involved in the crime charged here.* However, if you are convinced be-

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[2] Those separately cognizable offenses were 1) driving while intoxicated, and 2) failing to keep right of the median. *Grady v. Corbin*, 110 S.Ct. at 2088, 2094.

[3] Fed. R. Evid. 404(b) provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts is . . . admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident."

> yond a reasonable doubt, by other evidence, that the defendant did carry out the physical acts involved in the crime charged here, then you may consider this *evidence only* on the question of motice, opportunity, preparation, plan, knowledge, identity or absence of mistake.

United States v. Felix, 867 F.2d at 1074-75 (citing Fed. R. Evid. 404(b)) (emphasis added).

It is clear that Felix was not prosecuted in the Missouri case for the conduct that the government proved with respect to Counts 2 through 6 of the Oklahoma prosecution. Introducing 404(b) evidence of a prior bad act is not prosecution for that act. *United States v. Van Cleave*, 599 F.2d 954, 957 (10th Cir. 1979) (evidence of conduct for which the defendant had already been prosecuted "was not introduced for the purpose of retrying [him;] it was introduced to prove motive and intent in connection with . . . the charge for which he was then on trial"). As the Supreme Court explained in *Grady*,

> The critical inquiry is what *conduct* the State will prove, not the *evidence* the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing the same evidence in a subsequent proceeding. *See Dowling v. United States*, 493 U.S. — (1990).

Grady v. Corbin, 110 S.Ct. at 2093.

In holding that *Grady* mandates the reversal of Counts 2 through 6, the majority goes far beyond what the Supreme Court intended. First, the majority seems to require what the Supreme Court explicitly rejected: "that all charges against a defendant growing out of a single criminal transaction be tried in one proceeding." *Grady v. Corbin*, 110 S.Ct. at 2094, n.15 (quoting *Jones v. Thomas*, 491 U.S. 376 (1989) (Brennan, J., dissenting), *reh'g denied*, 110 S.Ct. 12 (1989)). Even this "same transaction" test, however, would not bar Felix's Oklahoma prosecution for Counts 2 through 6. His involvement in manufacturing methamphetamine at the lab in Beggs, Oklahoma, was temporally and geographically separate from his subsequent attempt to manufacture methamphetamine in Missouri, which occurred over a month after the Beggs lab was raided. In no sense were these events "a single criminal transaction." *Id.*[4]

Second, the majority's interpretation of *Grady* effectively eviscerates Fed. R. Evid. 404(b). The majority equates the introduction of 404(b) prior bad act evidence with prosecution for the bad acts. If that were the case, prosecutors could *never* introduce 404(b) evidence in situations where the defendant had already been prosecuted for the bad act without violating the Double Jeopardy Clause. Moreover, if Rule 404(b) evidence were allowed (because the conduct had not been prosecuted), it could never be introduced again without violating the Double Jeop-

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[4] The majority obfuscates the delineation between Felix's involvement in the Beggs laboratory and his subsequent attempt to set up another laboratory by describing the facts as a "course of conduct and events." Proposed Majority Opinion at 3. One could characterize a lifetime criminal's entire career in this fashion, but it would not mean the government, under the Double Jeopardy Clause, could only prosecute him once.

ardy Clause. It is inconceivable that the *Grady* Court, without any such indication, would limit so drastically the application of Rule 404(b).

Actually, the Supreme Court implicitly rejected such an incongruous interpretation of Rule 404(b) in *Dowling v. United States*, 110 S.Ct. 668 (1990).[5] At Dowling's trial for robbing a bank while wearing a ski mask and carrying a small pistol, a witness testified that a similarly masked and armed man broke into her home about two weeks after the bank robbery, that a struggle ensued, and that she unmasked the intruder, whom she identified as Dowling. The government offered this 404(b) evidence in order to strengthen its identification of Dowling as the bank robber. *Dowling v. United States*, 110 S.Ct. at 670. The residential burglary was an offense for which Dowling had already been prosecuted and acquitted. But the Supreme Court held that introducing the 404(b) testimony did not violate the Double Jeopardy Clause. *Id.* at 672-73.[6]

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[5] While the dissenters in *Grady* express their opinion that the decision is inconsistent with *Dowling*, *see* 110 S.Ct. at 2095-96 (O'Connor, J., dissenting); *id.* at 2102 (Scalia, J., with whom Rehnquist, C.J., and Kennedy, J., join, dissenting), the *Grady* majority gives no such indication. In fact, the opinion cites to *Dowling* for the proposition that "the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." *Grady v. Corbin*, 110 S.Ct. at 2093. Given this citation, and, "in the face of the challenge raised in the dissents, [*Grady*] should be read, if at all possible, not to overrule *Dowling*." *United States v. Calderone*, 917 F.2d 717, 724 (2d Cir. 1990) (Newman, J., concurring).

[6] The majority attempts to distinguish *Dowling* by suggesting that it only involved a question regarding the admissibility of evidence. The evidentiary question, however, was whether admission under Rule 404(b) of Dowling's prior bad act, for which he had already been tried and acquitted, violated the Double Jeopardy Clause.

In holding that it did not, the Court pointed to one of the many differences between introducing 404(b) evidence of a bad act and prosecution for that act: Rule 404(b) evidence is governed by a lesser standard of proof. *Dowling v. United States*, 110 S.Ct. at 672-73. The standard for Rule 404(b), recently reaffirmed in *Huddleston v. United States*, 485 U.S. 681, 689 (1988), is whether "the jury can reasonably conclude that the act occurred and that the defendant was an actor." This is obviously far less exacting than the "beyond a reasonable doubt" standard applicable to the actual offense.

In short, nothing in Supreme Court's Double Jeopardy jurisprudence supports the reversal of Felix's convictions on Counts 2 through 6.

III. Count 1: Conspiracy

The majority further demonstrates a disregard for the plain language of *Grady*'s rule in reversing Felix's conviction on the conspiracy count. The stated rationale is that the conspiracy count was premised on conduct for which Felix had been previously prosecuted in Missouri. Proposed Majority Opinion at 16. But this is neither a correct statement nor a correct application of *Grady*'s rule. It bears repeating that *Grady*'s rule only bars situations in which the prosecution,

> to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant had already been prosecuted.

Grady v. Corbin, 110 S.Ct. at 2093. In reversing the conspiracy count, the majority does not once cite to or apply this actual language. As a result, the majority overlooks both of its crucial elements.

A.

As with Counts 2 through 6, the conduct in question here does not "constitute an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 110 S.Ct. at 2093.

Here, too, the majority mistakenly focuses on the overlap of evidence presented at each trial. *See* Proposed Majority Opinion at 13-15. This approach blurs the distinction described in *Grady* between previously prosecuted conduct and evidence used to prove that conduct. The majority opinion, for example, states "The Missouri prosecution was premised on conduct that occurred from the spring of 1987 to August 31, 1987." Proposed Majority Opinion at 16. To support this statement, it cites to the Eighth Circuit's review of the Missouri conviction. The cited text, however, is the Eighth Circuit's discussion of the *evidence* admitted at trial (including the Rule 404(b) evidence discussed above in Section II). *See United States v. Felix*, 867 F.2d at 1070. As demonstrated above, the indictment reveals that Felix was only prosecuted for conduct committed "[f]rom on or about August 26, 1987, to on or about August 31, 1987 . . . ." R. Supp. Vol. II at 1. Felix had not already been prosecuted for his conduct prior to August 26.

The more difficult question is raised by the two overt acts alleged in Count 1 that did occur between August 26 and 31, 1987. Two of the eighteen overt acts alleged in this conspiracy count were:

> 17. On August 26, 1987, FRANK DENNIS FELIX, while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine.
>
> 18. On August 31, 1987, FRANK DENNIS FELIX, while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine.

R. Vol. I, Tab 1 at 3-5.

Whether these acts constitute the offense for which Felix had been prosecuted in Missouri depends on how far one is willing to expand the meaning of the word "offense." Felix was prosecuted for attempt to manufacture methamphetamine. R. Supp. Vol. II at 1. The attempt offense consists of two elements:

> (1) an intent to engage in criminal conduct, and (2) conduct constituting a "substantial step" towards the commission of the substantive offense which strongly corroborates the actor's criminal intent.

United States v. Felix, 867 F.2d at 1071 (quoting *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982)). Overt acts 17 and 18 of the Oklahoma indictment do not constitute the attempt offense. At most, the two acts constitute the second element of the attempt offense: the "substantial step" towards commission of the substantive crime.

The Second Circuit has interpreted the word "offense" broadly. It has held that *Grady* bars the subsequent prosecution from proving "conduct constituting the entirety of a previously prosecuted offense, or the entirety of an element of a distinct component of such an offense." *United States v. Calderone*, 917 F.2d 717, 725 (2d Cir. 1990) (Newman, J., concurring). However, in the absence of any indication

from the Supreme Court that it intended such a liberal interpretation of the word "offense," I would not adopt such an expansive holding. Applying *Grady*'s plain language, the two overt acts do not constitute the attempt offense for which Felix was already prosecuted in Missouri.

B.

Moreover, proof of the two overt acts at issue did not "establish an essential element" of the offense for which Felix was being prosecuted. Count 1 charged Felix and three other individuals with conspiring to manufacture, possess with intent to distribute, and distribute methamphetamine. R. Vol. I, Tab 1 at 1-2. The essential elements of conspiracy are as follows:

> The essence of the crime of conspiracy is an agreement to violate the law. The evidence . . . need only establish the *existence* of a conspiracy and that a defendant *knowingly contributed* his efforts in furtherance thereof.

United States v. Savaino, 843 F.2d 1280, 1293 (10th Cir. 1988) (citations omitted) (emphasis in original), *cert. denied*, 488 U.S. 836 (1988). "[A]n overt act is *not* a *necessary* element of conspiracy under the federal drug enforcement statutes." *Id.* at 1294 (emphasis added).

One position, then, would be that since overt acts are not an essential element of the conspiracy offense, *Grady* does not bar their introduction. But such a conclusion does not fully apply *Grady*'s plain language. It is arguable that the two overt acts, while not themselves an essential element, were introduced by the prosecution to *establish* an essential element:

the agreement to violate the drug laws. Indeed, although "[t]he essence of the crime of conspiracy is an agreement to violate the law[,] . . . [t]he nature of the offense of conspiracy with its attendant aspects of secrecy, often requires that elements of the crime be established by circumstantial evidence." *Id.* at 1293.

Careful scrutiny, however, reveals that the overt acts at issue here did not meaningfully "establish" an essential element of the conspiracy. The indictment reveals that the crux of the Oklahoma conspiracy concerned the conspirators' activities surrounding the Beggs lab. The two overt acts encompass Felix's illegal activity *after* the government seized the Beggs lab. Nothing in the evidence links any of Felix's co-conspirators to his subsequent attempt to manufacture methamphetamine in Missouri. In other words, the two overt acts do not "establish" an agreement between Felix and his co-conspirators in Oklahoma, nor do they "establish" any contribution to the Oklahoma conspiracy.[7]

The majority incorrectly relies on *United States v. Calderone* to support its reversal of the conspiracy conviction. *See* Proposed Majority Opinion at 11. Examination of the three opinions filed in that case reveals that the *Calderone* panel would not have reversed Felix's conviction on this count. Judge New-

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[7] Obviously, the contours of what conduct "establishes" an essential element will have to be determined by courts applying *Grady*'s rule. I do not dispute that some line-drawing will eventually be necessary. This, however, does not present a close case. In no sense did the two overt acts at issue "establish" the conspiracy, or any of its essential elements.

man, in his concurring opinion, explicitly rejected the interpretation of "establish" that the majority in this case adopts.

> [W]e are obliged to apply *Grady* in a way that gives the "element" component significance. That means barring the second prosecution only when the conduct previously prosecuted is to be used to "establish" the element of the second crime, which I think must mean "constitute the entirety of" the element. If *Grady* is read more broadly, that is, if the second prosecution is barred whenever the previously prosecuted conduct is to be used only *as evidence of* an element of the second offense, then we would almost be applying a "same evidence" test. [It is] more likely that the Supreme Court expected *Grady* to apply only when the conduct prosecuted at the first trial is or may constitute the entirety of an element of the offense at the second trial.

United States v. Calderone, 917 F.2d at 724 (footnote omitted) (emphasis in original).[8] Judge Newman correctly adopted this position in order not to conflict with the Supreme Court's decision in *Dowling*. *Id.* at 724.

[8] It is clear that Judge Miner, in dissent, not only agrees with this interpretation of "establish," but also holds to the literal language of the rest of the *Grady* rule. *Id.* at 726-29 (Miner, J., dissenting). Judge Pratt, who wrote the opinion of the court, does not explicitly address the "establish" element of *Grady*. He repeatedly emphasizes his concern, however, that the two prosecutions in that case—which were both for drug conspiracies—were prosecutions for the same offense disguised only by different descriptions of the requisite conspiracy agreement. *Id.* at 721 ("this conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from the first crime only in that the indictment happens to describe it differently"). Here, not only are the substantive offenses different, they also contemplate different times, places, and actors.

The Second Circuit has subsequently expanded *Calderone* beyond the limitations of Judge Newman's concurrence. In *United States v. Gambino*, 920 F.2d 1108 (2d Cir. 1990), the panel abandoned any analysis of the "establish" element. *Id.* at 1112. To the extent *Gambino* declines to correctly apply this and other elements of the *Grady* rule, I find the decision incorrect.

In addition, the majority attempts to distinguish the Third Circuit's interpretation of *Grady* in *United States v. Pungitore*, 910 F.2d 1084, 1109 (3d Cir. 1990). The majority adopts the interpretation of *Grady* that the *Pungitore* court specifically rejected. This is justified, we are told, because the Third Circuit's approach is based upon a "bifurcation" of the Double Jeopardy analysis that the Tenth Circuit has already rejected. *See* Proposed Majority Opinion at 10.

In reality, the Third Circuit's treatment of *Grady* is less about "bifurcation" than it is about how far *Grady*'s rule should be extended beyond its reasoning. The *Pungitore* court's reluctance to apply *Grady* "expansively," *id.* at 1110, was based on an examination of *Grady*, its precedential roots, and another Supreme Court case. And our supposed "rejection" of *Pungitore*'s approach, *United States v. Savaiano*, 843 F.2d 1280 (10th Cir. 1988), *cert. denied*, 488 U.S. 836 (1988), is a pre-*Grady* case that confirms the permissibility, under the Double Jeopardy Clause of prosecuting a defendant for both attempt and conspiracy offenses arising from the same conduct.

The question in *Pungitore* was whether the *Grady* rule barred a successive prosecution for a compound-complex felony when the defendant had already been prosecuted for one of the predicate offenses. *United States v. Pungitore*, 910 F.2d at 1109. The Third Circuit noted that both *Grady* and the case upon which it relied for its reasoning, *Illinois v. Vitale*, 447 U.S. 410 (1980) and *Brown v. Ohio*, 432 U.S. 161 (1977), involved a "discrete criminal event." *Id.* at 1110. The court also noted that the *Brown* Court, much like the *Grady* Court, was concerned with the practice of avoiding the Double Jeopardy Clause by "the simple expedient of *dividing a single crime into a series of temporal or spatial units.*" *Id.* (quoting and adding emphasis to *Brown v. Ohio*, 432 U.S. at 169).

The Third Circuit recognized, however, that some crimes *are* "made up of 'a series of temporal or spatial units,'" *id.*, and that the Supreme Court's decision in *Garrett v. United States*, 471 U.S. 773 (1985), *reh'g denied*, 473 U.S. 927 (1985), was "more closely analagous" to the question before them. In *Garrett*, the Supreme Court held that a continuous criminal enterprise (CCE) offense and its predicate offenses are separately punishable, and that "prosecution for a CCE offense after an earlier prosecution for a predicate offense is constitutional under the Double Jeopardy Clause." *Garrett v. United States*, 471 U.S. at 786. Although decided before *Grady*, *Garrett* distinguished *Grady's* predecessor, *Brown v. Ohio*, as involving a "single course of conduct—driving a stolen car." *Id.* at 787. That single act had supported prosecutions of a defendant for both joyriding and theft. This was unacceptable because "[e]very mement of his conduct was as relevant to the joyriding charge as it was to the auto theft charge." *Id.* Conversely, the CCE offense before the *Garrett* Court "spanned 5½ years and several states," while the predicate offense indictment specified only several days within a two month period. *United States v. Pungitore*, 910 F.2d at 1111. The *Garrett* Court cautioned against "ready transportation" of the "principles of double jeopardy from the classically simple situation presented in *Brown* to the multilayered conduct, both as to time and to place, involved in this case." *Garrett v. United States*, 471 U.S. at 789.

The Third Circuit concluded that "*Grady*, which finds its roots in 'single transaction' cases such as *Brown*, is no more applicable in the instant circumstances than *Brown* was in *Garrett*." *United States v. Pungitore*, 910 F.2d at 1111. This holding was not based upon "an approach to double jeopardy issues that this circuit has already rejected," as the majority claims. Proposed Majority Opinion at 10. To the contrary, the Third Circuit's holding was based upon the Supreme Court's decision in *Garrett*. And, as the Third Circuit noted, nothing in *Grady* indicates an intention to overrule *Garrett*.[9] *United States v. Pungitore*, 910 F.2d at 1111 n.29.

The Tenth Circuit case that the majority cites—*United States v. Savaiano*, 843 F.2d 1280 (10th Cir. 1988), *cert. denied*, 448 U.S. 836 (1988)—does not reject the approach of either *Garrett* or *Pungitore*. In *Savaiano*, we held that "separate sentences may be

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[9] The Third Circuit also applied *Garrett* in *United States v. Esposito*, 912 F.2d 60, 63-65 (1990) (rejecting a Double Jeopardy challenge to prosecution for predicate acts *after* the RICO prosecution and discussing both *Garrett* and *Grady* at length).

imposed for dual convictions of conspiracy and attempt under [21 U.S.C. §] 846." *id.* at 1293, *regardless* of whether the underlying conduct could be characterized as "a single act, course of conduct, or transaction." *Id.* at 1292 (citing with disapproval *United States v. Touw*, 769 F.2d 571, 574 (9th Cir. 1985)). We refused to categorize the underlying conduct because its category was irrelevant: "Once conspiracy and attempt are identified as separate crimes, separate punishment follows, just as separate punishment may be imposed for convictions on conspiracy and the completed crime." *Id.* at 1293.[10] Thus, if it rejects anything, *Savaiano* rejects the interpretation that the majority adopts today.

The majority could learn from the Third Circuit's reluctance to extend *Grady* beyond its roots. The reasoning behind *Garrett* similarly applies to prosecutions for conspiracy. Like compound-complex felonies, conspiracy often involves "multilayered conduct, both as to time and to place."[11] *Garrett v. United States*, 471 U.S. at 789. The majority's position would prohibit any temporally separate prosecutions for attempt and conspiracy with overlapping eviden-

[10] While we further commented that the Ninth Circuit's categorization approach guaranteed additional litigation and provided little guidance to the parties or the district courts, *United States v. Savaiano*, 843 F.2d at 1293, this dicta did not constitute our *ratio decidendi*, and was limited to the narrow issue before us in *Savaiano*. At any rate, we were (and are) not in a position to "reject" the Supreme Court precedent embodied in *Garrett*.

[11] Here, Felix's Oklahoma conspiracy indictment spanned four months, while the prior Missouri attempt indictment confined itself to acts committed within a six-day period.

tiary support.[12] I do not believe that either Congress or the Supreme Court intended such a result, particularly in the area of drug offenses.

In sum, when each of its elements is applied, the *Grady* rule does not warrant reversal of Felix's conviction on Count 1. Applying *Grady*'s plain language, conduct constituting the offense for which Felix was prosecuted, i.e., conduct constituting an attempt to manufacture methamphetamine between August 26 and 31, 1987, was not proved in Felix's Oklahoma prosecution to establish an essential element of the conspiracy charge.

CONCLUSION

The majority adopts an interpretation of *Grady* so expansive that it casts a shadow over a great part of accepted criminal law and procedure. There is no indication in *Grady* that the Supreme Court intended such a result.

Examination of *Grady*'s actual holding reveals that it stands for a relatively narrow proposition: prosecutors may not, to establish an essential element of a charge, attempt to prove conduct that constitutes an offense for which the defendant has already been prosecuted. This squares with Fed. R. Evid. 404(b), *Dowling*, *Garrett*, and the rest of our jurisprudence. The majority's holding does not.

I am mindful of the abuses of successive prosecution that the Double Jeopardy Clause is intended to prevent. The State must "not be allowed to make repeated attempts to convict an individual for an al-

[12] Moreover, in rejecting *Pungitore's* analysis, the majority's interpretation of *Grady* risks stifling prosecution of all complex, continuing criminal offenses.

leged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Grady v. Corbin*, 110 S.Ct. at 2091 (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)). But the Oklahoma prosecution was in no way an attempt to convict Felix for the same offense, or even the same conduct. The "ordeal" Felix underwent was the natural result of committing a series of separate federal drug offenses during the summer of 1987.

Accordingly, I dissent. The judgment of the district court should be Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 89-16-CR

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK DENNIS FELIX, ET AL., DEFENDANTS

[Filed Mar. 20, 1989]

ORDER
DENYING ALL DEFENDANTS' MOTIONS FOR BILLS OF PARTICULAR

Three defendants have made enumerated requests for particulars in order to adequately prepare their defenses and to avoid prejudicial surprise.

The grant or denial of a bill of particulars is within the discretion of the trial court. Fed. R. Crim. P., Rule 7(f).

The purposes of a bill of particulars are to inform an accused of the nature of the charge or charges against him with specific precision to enable him to prepare for trial, to avoid and minimize the danger of surprise at the time of trial, and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague and indefinite for such

purposes, *Tritt v. United States*, 421 F.2d 928, 930 (10th Cir. 1970); *Wyatt v. United States*, 388 F.2d 395, 397 (10th Cir. 1968). A defendant is not entitled to a bill of particulars unless the information requested would define more specifically the offense or offenses charged against him, *United States v. Evans*, 542 F.2d 805, 809 (10th Cir. 1976), *cert. denied*, 429 U.S. 1011, 97 S.Ct. 1124, 51 L.Ed. 2nd 550 (1977); *United States v. Gleeson*, 422 F.2d 1091, 1094 (10th Cir. 1969). It is not the function of the bill of particulars to disclose in detail the evidence upon which the government will rely at trial, *Cefalu v. United States*, 234 F.2d 522, 524 (10th Cir. 1956).

The court finds that the indictment adequately apprises defendants of the charges against them with sufficient precision to enable them to prepare for trial and avoid surprise in the case. Accordingly, defendants' motions for bills of particulars are denied. Fed. R. Crim. P., Rule 7(f).

DENYING ALL DEFENDANTS' MOTIONS FOR SEVERANCE

Three defendants have moved the court for separate trials from other defendants. Federal Rules of Criminal Procedure 14 provides that if it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires. To support a motion for severance a defendant must carry the heavy burden of showing prejudice by the joinder, *United States v. Parnell*, 581 F.2d 1374, 1383 (10th Cir. 1978). The defendant must show clear prejudice by the joinder at trial, *United States v. Bridwell*, 583

F.2d 1135, 1142 (10th Cir. 1978); *United States v. Smaldone*, 485 F.2d 1333, 1345 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

One defendant cites *Bruton v. United States*, 391 U.S. 123 (1968), as authority for his motion for severance. In *Bruton* a codefendant had made statements incriminating Bruton and Bruton was deprived of the right to cross-examine the codefendant as to the statements because the codefendant could not be called to the stand. The United States Supreme Court held that prejudice to Bruton due to lack of the ability to cross-examine the other defendant required that Bruton be tried separately. However, in this case the defendant has failed to show the court that any codefendant made a statement incriminating another. Therefore, *Bruton* is inapplicable to this case. Further, as to the other moving defendants, prejudice requiring severance is not present merely because the evidence against another defendant is greater than that against the moving defendant. *United States v. Dickens*, 695 F.2d 765 (2nd Cir. 1982). Also, the fact that separate trials might offer a better chance for acquittal of one or more other defendants does not establish prejudice requiring severance. *United States v. Knowles*, 572 F.2d 267 (10th Cir. 1978). Accordingly, defendants' motions to sever are denied.

DENYING ALL DEFENDANTS' MOTIONS FOR PRODUCTION AND INSPECTION OF GRAND JURY MINUTES

The defendants have moved for the production and inspection of Grand Jury minutes. However, their motions seek the production of testimony of Grand Jury witnesses, pursuant to Rule 6(e), Federal Rules

of Criminal Procedure. However, the defendants do not allege or show that any grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury. Rule 6(e)(3)(C)(ii), Federal Rules of Criminal Procedure. Accordingly defendants' motions are denied.

DENYING ALL DEFENDANTS' MOTIONS *IN LIMINE*

The defendants Pinter and Garrison move to exclude from evidence the in-court identification of those defendants, citing the *Wade* and *Gilbert* decisions. Defendants' arguments are based on illegal pre-trial lineup procedures which would taint an in-court identification. There is no allegation or indication of such procedures herein, and the defendants are not entitled to a pre-trial lineup for identification purposes. *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); and their progeny. The motions in limine of defendants Pinter and Garrison are denied.

The defendants Felix and McNeil move to exclude from evidence prior bad acts and other offenses. Such evidence is not admissible, unless and until the government shows an exception as allowed by the Rules of Criminal Procedure. At this time these defendants' motions are denied, subject to proper objection being made at the time of trial by defendants.

DENYING DEFENDANTS PINTER AND GARRISON MOTIONS FOR A PRE-TRIAL *PETERSEN-ANDREWS* HEARING

The defendants Pinter and Garrison have moved for a pre-trial hearing on the determination of admissibility of co-conspirators statements. The court will determine the admissibility of such statements

at the time of trial pursuant to *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978) and *United States* v. *Petersen*, 611 F.2d 1313 (10th Cir. 1979). Accordingly, these defendants motions are denied.

DENYING DEFENDANTS FELIX AND McNEIL MOTIONS TO STRIKE SURPLUSAGE

The defendants Felix and McNeil have moved to strike the overt acts alleged in the conspiracy count, Count One, as surplusage. Although the allegation of overt acts is not necessary in a § 846 drug conspiracy, the allegation and proof of such overt acts is not improper or error. 21 U.S.C. 846. Accordingly, these motions of these defendants are denied.

GRANTING IN PART AND DENYING IN PART ALL DEFENDANTS MOTIONS FOR ALL DISCOVERY and ADDITIONAL DISCOVERY

All defendants have moved for discovery and additional discovery, including exculpatory materials, Jencks Act materials, and disclosure of deals, promises, and/or agreements made by the government. The government has responded that it will provide all discovery materials required by Rule 16, Federal Rules of Criminal Procedure. This court orders such discovery as is required by that Rule, as to all defendants, and insofar as defendants discovery requests are mandated by Rule 16, their motions are granted, otherwise, they are denied. The court orders that all discovery shall be in the United States Attorney's Office in Muskogee, Oklahoma, on or before 12:00 Noon, March 24, 1989.

The defendants' entitlement to exculpatory materials was established in *Brady v. Maryland*, 373 U.S. 83 (1963). Accordingly, the government is hereby directed to conduct a thorough examination of its files

with a view towards determining those items contained therein which may be of an exculpatory nature regarding these defendants. Because the pretrial determination of the exculpatory nature of any material is a duty imposed upon the prosecutor, many problems and disputes are likely to arise, if before the trial, the prosecutor's decisions in that regard are found to be inadequate. For example, disclosure is required of material which may be used to impeach *substantially* the credibility of *key* government witnesses. Obviously, the determination of what is substantial impeachment, or who is a key witness, hinges on subjective criteria. The court directs that the determination of such subjective criteria be on the side of disclosure, so that problems and disputes may be avoided. *See United States v. Agurs*, 427 U.S. 97 (1976). In this regard, the search of the government's files, as ordered herein, is not restricted to any class, category or characterization of the materials to be searched. Thus the government's search is to include, and is not limited to, statements made by any person with knowledge of this action, or facts involving this action, without regard to whether those statements were made to a government agent or to the grand jury. Likewise, this search is not restricted to the disclosure of statements of individuals, but includes documentary and other tangible evidence of every conceivable description. It includes all materials within the possession or under the control of the prosecution, including all governmental and law enforcement agents and agencies. Further, the government is to immediately notify counsel for the defendants upon discovery of any *Brady* materials, and to immediately disseminate such materials to the defendants.

The court orders that the government abide by its continuing obligation to promptly furnish defendants with any additional exculpatory evidence of which it subsequently has knowledge. Strict and good faith compliance by the government of the requirements of *Brady* and this order in all respects is hereby expressly directed.

Although the literal language of 18 U.S.C. § 3500 does not make a statement or report of a government witness or prospective witness the subject of discovery or inspection until such witness has testified on direct examination of the trial, such literal application often times runs afoul of the orderly administration of justice and constitutional rights.

The United States Attorney, as well as this court, has an ethical duty and responsibility to see that justice is done. Accordingly, the government is ordered to make every effort to voluntarily turn over to defense counsel Jencks Act statements or reports of known trial witnesses at least the day before such witness testifies, absent good cause shown to the contrary, e.g., threats of witness harassment or undue prejudice, in order to prevent the necessity of continual recesses to provide defense attorneys an opportunity to examine Jencks Act material and prepare their cross-examination.

DENYING DEFENDANTS PINTER AND GARRISON MOTIONS TO DISMISS

The defendants Pinter and Garrison have filed identical motions to dismiss on grounds of double jeopardy and delay in indictment. Defendants double jeopardy arguments are that the conspiracy count of the indictment, Count One, is duplicitous in that it charges more than one offense, and that Counts Two,

Three, Four, and Five are multiplicitous with each other and with Count One, in that they are but one offense. The defendants make no other allegations, explanations, or showing of how the indictment is either duplicitous or multiplicitous. The court has examined the indictment and finds that Count One charges one conspiracy offense, and that Counts Two, Three, Four, and Five of the indictment charge separate and distinct substantive offenses, each count requiring proof of a fact or element not required by the other. *United States* v. *Zwego*, 657 F.2d 248, 251 (10th Cir. 1981).

The court further finds the defendants argument for dismissal due to delay to be without merit, in that the indictment was brought well within the statute of limitations for all of the offenses contained therein. 18 U.S.C. 3282.

Accordingly, the motions to dismiss of the defendants Pinter and Garrison are denied.

DENYING THE MOTIONS OF DEFENDANTS FELIX AND McNEIL TO DISMISS

Both of these defendants have made motions to dismiss on the grounds that the indictment is too general and vague and fails to state any offense against these defendants. Defendant Felix also moves to dismiss on the grounds of double jeopardy.

In regard to both defendants contentions that the indictment is too vague and fails to state any offense against them, the court must look to the allegations in the indictment to determine its sufficiency. An indictment must allege all the elements of a crime charged. *United States v. Herbst*, 565 F.2d 638 (10th Cir. 1977); *United States v. Tye*, 519 F.2d 586 (10th Cir. 1975), *cert. denied*, 423 U.S. 989, 96 S.Ct.

400, 46 L.Ed. 2nd 306 (1975). It will generally be deemed sufficient if it sets forth the elements of the offense charged and apprises the accused on the nature of the crime charged, so that he will be enabled to prepare a defense and plead the judgment in bar. *United States v. Herbst*, supra; *United States v. Tokoph*, 514 F.2d 597 (10th Cir. 1975). As the Supreme Court stated in *Hambling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2nd 590 (1974):

> "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense . . . It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished'. 418 U.S. at 117."

The indictment herein sets out all the essential elements of the offenses charged and apprises defendants of the crimes with which they are charged. The indictment substantially follows the wording of the statutes, delineates the elements of the offenses charged and apprises the defendants of the nature and extent of the charges against them and of what they must be prepared to meet. The indictment contains sufficient information to enable defendants to prepare a defense to the charges and to plead the judgment in this case as a bar. Accordingly, the in-

dictment is sufficiently specific to withstand defendants' motions to dismiss the indictment.

Defendant Felix also moves to dismiss based on double jeopardy. This defendant was previously convicted of a violation of 21 U.S.C. 846, *Attempting* To Manufacture A Controlled Substance, in the Western District of Missouri. (Emphasis added). The § 846 offense in this indictment is for *Conspiracy* to Manufacture, in the Eastern District of Oklahoma. (Emphasis added). None of the other substantive counts charge *Attempting* To Manufacture, and they are all alleged to have occurred in the Eastern District of Oklahoma. The court finds the offenses herein are separate and distinct from defendant's conviction in Missouri, and his double jeopardy argument is without merit.

Accordingly, the motions to dismiss of defendants Felix and McNeil are denied.

IT IS ALL SO ORDERED this 20th day of March, 1989.

/s/ Frank H. Seay
FRANK H. SEAY
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 89-16-CR

UNITED STATES OF AMERICA, PLAINTIFF,

v.

FRANK DENNIS FELIX,
RODERICK MALCOLM MCNEIL, a/k/a "RICK",
DORA JEAN GARRISON, and
BILLY JOE PINTER, a/k/a "B.J.", DEFENDANTS.

[Filed 2-16-89]

INDICTMENT

The Grand Jury charges:

COUNT 1

(21 USC § 846)

A. *Objects of the Conspiracy*

From on or about the 1st day of May, 1987, and continuously thereafter to on or about the 31st day of August, 1987, in the Eastern District of Oklahoma and elsewhere, FRANK DENNIS FELIX, RODERICK MALCOLM MCNEIL, DORA JEAN

GARRISON, and BILLY JOE PINTER, the defendants herein, and Paul Dean Roach, an unindicted co-conspirator, wilfully and knowingly did combine, conspire, confederate and agree together, with each other, and with diverse others both known and unknown to the Grand Jury to commit offenses against the United States, in violation of Title 21, United States Code, Section 846, as follows:

(1) To knowingly and intentionally manufacture methamphetamine amphetamine, Schedule II controlled substances, contrary to Title 21, United States Code, Section 841(a)(1).

(2) To knowingly and intentionally possess with intent to distribute methamphetamine amphetamine, Schedule II controlled substances, contrary to Title 21, United States Code, Section 841(a)(1).

(3) To knowingly and intentionally distribute methamphetamine amphetamine, Schedule II controlled substances, contrary to Title 21, United States Code, Section 841(a)(1).

B. *Means of the Conspiracy*

The objects of the conspiracy were to be accomplished and were accomplished as follows:

Defendant FRANK DENNIS FELIX would provide financing, chemicals, and equipment for the setting-up of illegal laboratories for the manufacture of methamphetamine/amphetamine.

Defendants FRANK DENNIS FELIX, DORA JEAN GARRISON, RODERICK McNEIL, and BILLY JOE PINTER, and other unindicted co-conspirators both known and unknown to the Grand Jury, would acquire chemicals and equipment for the illegal manufacture of methamphetamine/amphetamine.

Defendant BILLY JOE PINTER would provide a location for the setting-up of illegal laboratories for the manufacture of methamphetamine/amphetamine in the Eastern District of Oklahoma.

Deefndants FRANK DENNIS FELIX, DORA JEAN GARRISON, RODERICK MALCOLM McNEIL, and BILLY JOE PINTER, and other unindicted co-conspirators both known and unknown to the Grand Jury, would manufacture methamphetamine/amphetamine for distribution in the Eastern District of Oklahoma and elsewhere.

Defendants FRANK DENNIS FELIX, DORA JEAN GARRISON, RODERICK MALCOLM McNEIL, and BILLY JOE PINTER, and other unindicted co-conspirators both known and unknown to the Grand Jury, would possess with intent to distribute and distribute methamphetamine.

C. *Overt Acts*

To effect the objects of the conspiracy, the defendants and others, known and unknown to the Grand Jury, committed diverse overt acts within the Eastern District of Oklahoma and elsewhere, among which were the following:

1. The defendant DORA JEAN GARRISON contacted an individual familiar with the manufacture of amphetamine named Paul Dean Roach in May of 1987, to arrange a meeting between defendant FRANK DENNIS FELIX and Roach.

2. GARRISON arranged a meeting between GARRISON, FELIX and Roach which was held at a graveyard east of Garland, Texas, in May of 1987.

3. At this meeting, FELIX and GARRISON and Roach discussed the manufacture of amphetamine. Roach was to "cook" the amphetamine and FELIX

was to furnish the necessary equipment and chemicals while learning how to "cook" from Roach. Pursuant to this agreement, Roach was to receive one pound of every five pounds he "cooked."

4. FELIX advised Roach he (FELIX) already had a location in Oklahoma for the lab site. The place to be maintained and used was property made available by B.J. PINTER in rural Okmulgee County, Oklahoma.

5. Roach travelled to the Oklahoma location following directions given him by FELIX.

6. Roach travelled to Okmulgee, Oklahoma, as directed by FELIX and met B.J. PINTER. B.J. PINTER and Roach then travelled to the Beggs, Oklahoma area.

7. PINTER and Roach moved travel trailers to the lab site in Okmulgee County and set-up the equipment.

8. In early June 1987, FELIX bought five pounds of phenylacetic acide and two 5000 milliliter single neck flasks.

9. On June 5, 1987, FELIX, "RICK" McNEIL, and another individual travelled to Tulsa, Oklahoma and purchased precursor chemicals for methamphetamine /amphetamine manufacture.

10. On June 16, 1987, B.J. PINTER bought four gallons of formamide, four gallons of methylamine and 110 pounds of phenylacetic acid from a chemical store located in Tulsa, OK.

11. On June 18, 1987, FELIX and another individual bought a 22 liter flask and a 22 liter heating mantle and five gallons of ether from a chemical store located in Tulsa, OK.

12. On July 1, 1987, FELIX and another individual bought more equipment and chemicals used in

the manufacture of methamphetamine from a chemical store located in Tulsa, OK.

13. On July 6, 1987, B.J. PINTER picked up an order of chemicals and miscellaneous items placed and paid for by FELIX on July 1, 1987, from a chemical store located in Tulsa, OK.

14. On July 8, 1987, PINTER bought two thermometers, electrical adapters, 100 grams of hydrochloric acid and two bottles of hydrogen chloride gas from a chemical store located in Tulsa, OK.

15. On July 13, 1987, "RICK" McNEIL travelled to Tulsa, Oklahoma and purchased equipment and chemicals utilized in methamphetamine manufacture. While at a chemical store in Tulsa, Oklahoma, McNEIL made a phone call to facilitate the manufacture of methamphetamine.

16. On July 13, 1987, PINTER bought drums of chemicals at a chemical store in Oklahoma City, Oklahoma, and transported them back to Okmulgee County, Oklahoma.

17. On August 26, 1987, FRANK DENNIS FELIX, while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine.

18. On August 31, 1987, FRANK DENNIS FELIX, while at a location in Missouri, posesssed chemicals and equipment necessary in the manufacture of methamphetamine.

All in violation of Title 21, United States Code, Section 846.

COUNT 2

(21 USC 841(a)(1) and 18 USC § 2)

On or about the 13th day of July, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX, RODERICK MALCOLM McNEIL, DORA

JEAN GARRISON, and BILLY JOE PINTER, defendants herein, did unlawfully, knowingly and intentionally manufacture methamphetamine, a Schedule II Controlled Substance.

All in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 3

(21 USC § 841(a)(1) and 18 USC § 2)

On or about the 13th day of July, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX, RODERICK MALCOLM McNEIL, DORA JEAN GARRISON, and BILLY JOE PINTER, defendants herein, did unlawfully, knowingly and intentionally possesses, with intent to distribute, approximately five and one-quarter pounds of methamphetamine, a Schedule II Controlled Substance.

All in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 4

(21 USC § 841(a)(1) and 18 USC § 2)

On or about the 13th day of July, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX, RODERICK MALCOLM McNEIL, DORA JEAN GARRISON, and BILLY JOE PINTER, defendants herein, did knowingly and intentionally possess approximately 4 gallons of methamphetamine oil, a Schedule II Controlled Substance, with intent to manufacture methamphetamine.

All in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 5

(21 USC § 841(a)(1) and 18 USC § 2)

On or about the 13th day of July, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX, RODERICK MALCOLM McNEIL, DORA JEAN GARRISON, and BILLY JOE PINTER, defendants herein, did knowingly and intentionally manufacture phenylacetone, a Schedule II Controlled Substance.

All in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 6

(21 USC § 856 and 18 USC § 2)

From on or about June 1, 1987, to on or about July 13, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX and BILLY JOE PINTER, did wilfully and knowingly maintain and/or make available for use a place and enclosure for the purpose of manufacturing a controlled substance, to-wit: methamphetamine/amphetamine, Schedule II Controlled Substances; in violation of Title 21, United States Code, Section 856 and Title 18, United States Code, Section 2.

COUNT 7

(18 USC §1952 and 18 USC § 2)

During the month of May, 1987, the exact date to the Grand Jury unknown, in the Eastern District of Oklahoma and elsewhere, the defendant DORA JEAN GARRISON wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent

to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine/amphetamine, in violation of federal statutes, Title 21, United States Code, Section 841(a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine/amphetamine, Schedule II Controlled Substances, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

COUNT 8

(18 USC § 1952 and 18 USC § 2)

On or about July 13, 1987, in the Eastern District of Oklahoma and elsewhere, the defendant DORA JEAN GARRISON wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent to promote, manage, establish, carry on, or faciltate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, in violation of federal statutes, Title 21, United States Code, Section 841(a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, a Schedule II Controlled Substance, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

COUNT 9

(18 USC § 1952 and 18 USC § 2)

On or about June 21, 1987, in the Eastern District of Oklahoma and elsewhere, the defendant FRANK DENNIS FELIX wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine/amphetamine, in violation of federal statutes, Title 21, United States Code, Section 841(a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying of an unlawful activity, to-wit: manufacture of methamphetamine/amphetamine, Schedule II Controlled Substances, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

COUNT 10

(18 USC § 1952 and 18 USC § 2)

On or about July 13, 1987, in the Eastern District of Oklahoma and elsewhere, the defendant FRANK DENNIS FELIX wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, in violation of federal statutes,Title 21, United States Code, Section 841 (a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, a Schedule II Controlled Substance, in violtation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

COUNT 11

(18 USC § 1952 and 18 USC § 2)

On or about July 13, 1987, in the Eastern District of Oklahoma and elsewhere, the defendant RODERICK MALCOLM McNEIL wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity,

to-wit: manufacture of methamphetamine, in violation of federal statutes, Title 21, United States Code, Section 841(a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, a Schedule II Controlled Substance, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

A TRUE BILL:

Grand Jury Foreman

ROGER HILFIGER
United States Attorney

PAUL G. HESS
Assistant United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

No. 87-05014-01-CR-SW-4

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FRANK DENNIS FELIX, DEFENDANT

[DOB: 6-14-44]

Count One: 21 U.S.C. § 846 and 841(a)(1)
NMT 20 years and or $1 million plus a minimum mandatory Special Parole Term of 3 years
$50 Mandatory Penalty Assessment

[Filed Sep. 15, 1987]

INDICTMENT

THE GRAND JURY CHARGES THAT:

Count One

From on or about August 26, 1987, to on or about August 31, 1987, in Jasper County, in the Western District of Missouri, and elsewhere, FRANK DEN-

NIS FELIX, knowingly and intentionally did attempt to manufacture methamphetamine, a Schedule II controlled substance; all in violation of Title 21, United States Code, Section 846 and 841(a)(1).

A TRUE BILL

/s/ Dan A. Daniel
Foreperson of the Grand Jury

/s/ Gregory K. Johnson
GREGORY K. JOHNSON
Assistant United States Attorney

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 292081 20473